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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR GARCIA, Defendant and Appellant.	B256843 (Los Angeles County Super. Ct. No. BA415448)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

After the trial court denied Oscar Garcia's motion to suppress evidence under Penal Code section 1538.5, he pleaded no contest to three counts of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)) and admitted that he had previously been convicted of a serious or violent felony.[1] He appeals from denial of the motion, contending police had no reasonable belief, based upon articulable facts, that a protective sweep was necessary to ensure their safety while serving an arrest warrant. We affirm.

Background

On August 25, 2010, Montebello Police Officer Melissa Leal and Detective Andrew Fivecoat went to a residence to serve an arrest warrant on Garcia for possession of narcotics in a jail facility. The residence belonged to Garcia's parents. Garcia's sister, Araceli Garcia, answered the door. When she was informed the officers had a warrant for Garcia's arrest, she asked Leal to stay at the door or in the entryway while she went to get him. When she started moving from the entryway toward a hallway, Leal told her to stop so the officers would not lose sight of her, for "officer safety" purposes. Araceli then called to Garcia, saying "The cops are here for you," and went from the entryway to the hallway, again calling to Garcia.

Fivecoat and Leal heard "scrambling" or "rustling," and entered the residence and walked toward the bedroom, Fivecoat in the lead, drawing his weapon. At least two closed doors lead from the hallway, in addition to a half-open bedroom door at the end. When he reached the bedroom door, Fivecoat saw Garcia back out of a closet in the room, but could not see inside it. He handcuffed Garcia and, using him as a shield, backed toward the bedroom door, holding Garcia between himself and the closet. He then handed Garcia off to Leal and went back to search the bedroom. Once Garcia was out of the room, Fivecoat searched the closet first, which measured about three feet by four feet and in which a chaise lounge occupied most of the available floor space. He could not see the chaise lounge at first because clothing was piled on top of it. When he

[1] Undesignated statutory references will be to the Penal Code.

moved the clothes to see if anyone was hiding under them, he discovered a bullet on the chaise lounge.

Fivecoat believed someone could possibly hide under the chaise lounge, so he moved a bag that was underneath it. He did not see anyone, but as he moved the bag, it opened and he saw the handle of a pistol inside. In addition, he saw a rifle under the chaise lounge. Ultimately, Fivecoat recovered two pistols, a rifle, several magazines for various calibers of ammunition, and some ammunition from the closet.

Fivecoat cleared the rest of the bedroom by looking under the bed, then secured the weapons and stayed in the room with the weapons until backup arrived. After other units arrived and police secured the guns in the trunk of his police vehicle, Fivecoat searched the rest of the house, except for one bedroom, to which the door was locked.

Garcia pleaded not guilty and moved to suppress evidence of the three guns discovered by Fivecoat, arguing the warrantless, nonconsensual search of Garcia's closet was unreasonable because it was unsupported by probable cause.

At the preliminary hearing, Fivecoat testified he approached Garcia's bedroom because he "heard rustling" coming from it and "suspected that somebody might try to be either going out of a window, trying to flee or trying to grab a weapon. [He] didn't know what was going to happen. So [he] made entry, further entry into the residence and toward the bedroom." Once there, Fivecoat saw Garcia "walking backwards from a closet" and "believed he might be trying to hide somebody" in it. He heard no noise coming from the closet and saw nobody in it, but was not sure the rustling he had heard came only from Garcia. Fivecoat "suspected that there could be somebody in there, [but] didn't have any hard evidence."

The trial court denied Garcia's motion to suppress, finding Fivecoat's search was a legitimate protective sweep under *Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*). Garcia then changed his plea to no contest and admitted a prior strike and three prior convictions. The court sentenced him to five years in prison on the first count, plus two concurrent two-year sentences for the second and third counts. He timely appealed.

DISCUSSION

Garcia challenges the denial of his motion to suppress, arguing a protective sweep must be supported by articulable facts causing a reasonable officer to believe a dangerous individual is present, and Detective Fivecoat failed to articulate any such facts.

On appeal from a denial of a motion to suppress, "all presumptions are in favor of the trial court's factual findings, whether express or implied, where supported by substantial evidence, and we review de novo the facts most favorable to the People to determine whether the officers' conduct in performing the protective sweep of defendant's home was reasonable under the Fourth Amendment." (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 862 (*Ledesma*).) Under article I, section 28, subdivision (d) of the California Constitution, we evaluate the legality of police conduct under federal constitutional standards. (*People v. Woods* (1999) 21 Cal.4th 668, 674; *Ledesma*, *supra*, 106 Cal.App.4th at pp. 862-863.)

As set forth by the United States Supreme Court in *Buie*, protective sweeps are governed by the "reasonable suspicion" standard, which requires that there be "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie, supra*, 494 U.S. at p. 334.) In determining the existence of reasonable suspicion, courts must evaluate the "'totality of the circumstances'" on a case-by-case basis to determine whether the officer has a "'particularized and objective basis'" for the suspicion. (*United States v. Arvizu* (2002) 534 U.S. 266, 273.) The officers on the scene may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person,'" and may rely on facts consistent with an innocent as well as a guilty explanation. (*Id*. at pp. 273, 274.) "Reasonable suspicion" is an abstract concept, not a "'finely-tuned standard[],'" and may not be encumbered in its determination with a "'neat set of legal rules.'" (*Ornelas v. United States* (1996) 517 U.S. 690, 695-696.) The Court has admonished that we must avoid "unrealistic second-guessing" of police officers acting "in a swiftly developing

situation . . . . [Citation.] A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. . . . [Citation.] The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." (*United States v. Sharpe* (1985) 470 U.S. 675, 686-687 [105 S.Ct. 1568, 84 L.Ed.2d 605].)

In evaluating whether reasonable suspicion supports a protective sweep, we take into account the type and location of the police action and the activity police contemplate will follow the sweep. A protective sweep may "occur[] as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime," and "an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." (*Buie*, *supra*, 494 U.S. at p. 333.)

Applying these principles, we conclude the challenged protective sweep was justified. Here, officers served an arrest warrant at a house in which at least one other person—Garcia's sister—and possibly more—Garcia's parents, who owned the residence—were present. When they arrived, Garcia's sister warned Garcia the police were looking for him, and he was for some time out of their sight in the bedroom. The officers heard noises coming from the bedroom, and when they finally saw him, he was backing out of a closet. Under these circumstances, the officers knew Garcia had not emerged from the bedroom immediately upon being informed they were there, but on the contrary made some preparations prior to his contact with police, preparations that involved the closet. In such a situation, the officers reasonably suspected there might be more than two people in the house, and that one of them might be in the closet. "[T]the information known to the investigating officers, filtered through the lens of their experience and training, justified the protective sweep undertaken" and satisfied the requirements of *Buie*. (*Ledesma*, *supra*, 106 Cal.App.4th at p. 865.)

Relying on *United States v. Archibald* (6th Cir. Tenn. 2009) 589 F.3d 289 (*Archibald*), Garcia cogently argues an officer cannot merely assume the presence of

multiple individuals, as reliance on such an assumption would defeat the purpose of the reasonable suspicion standard set forth in *Buie*. We agree. Nonetheless, *Archibald* does not require reversal.

In *Archibald*, four Metropolitan Nashville police officers went to a suspect's residence to serve him with arrest warrants for probation violations. One of the officers knocked on the door repeatedly and heard movement inside the residence, but no one came to the door or gave a verbal response. The officer told his colleagues, "I can hear him. I can hear someone moving around inside." (*Id*. at p. 292, italics omitted.) After approximately three to five minutes of additional knocking, a male voice behind the door asked who was there, and after the police identified themselves there were "shuffling sounds" from inside that went on for another approximately five minutes before the suspect finally emerged. Once he did, the police pulled him from the apartment, then searched it, discovering cocaine. (*Id*. at pp. 292-293.)

Regarding the possibility of more than one person being in the apartment, a police officer testified he had heard only one voice, could not ascertain from the rustling sounds how many people were in the apartment, and had no additional facts that indicated someone else was there. (*Archibald*, *supra*, 589 F.3d at p. 293.) The government argued the suspect's delayed response to the police's knocking and the shuffling sounds heard inside the residence created a reasonable belief that someone else was inside the residence that posed a threat to the officers. (*Id*. at p. 300.) The Circuit Court disagreed:

"Clearly, *Buie* requires more than ignorance or a constant assumption that more than one person is present in a residence. [Fn.] . . . [A] lack of knowledge as to whether others [are] in a home necessarily fail[s] the *Buie* standard because that standard requires 'articulable facts,' not ignorance: [¶] 'In fact, allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. Finally, and perhaps most importantly, allowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in *Buie* that the police have

an articulable basis on which to support their reasonable suspicion of danger from inside the home. "No information" cannot be an articulable basis for a sweep that requires information to justify it in the first place. [¶] [Citation.] Accordingly, cases that have found that noises emanating from a residence supported a reasonable belief in the presence of other individuals have required contributing facts . . . supporting the officers' suspicions that more than one person was present." (*Archibald, supra*, 589 F.3d at p. 300.)

Archibald is distinguishable. There, police officers had no information indicating anyone other than their suspect resided in the residence they searched, and they heard nothing but the sounds of one person moving around inside. And when the suspect opened the door they pulled him from the residence. Here, officers knew the residence was owned by Garcia's parents, and that at least two other individuals—Garcia and his sister—were present. The officers could not determine whether the rustling sounds they heard were made by only one person, and when they took Garcia into custody they were not outside, but rather inside in a confined hallway that served multiple rooms. The officers could reasonably believe that unknown other persons were in the residence and that managing an arrest in a confined, unfamiliar area posed a risk to their safety should the closet from which Garcia had withdrawn gone unsecured.

Finding Garcia's arguments to be without merit, we affirm the trial court's denial of the suppression motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.